In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1905.

No. 230.

ANTONIO ORTEGA, *Plaintiff in Error*,

vs.

ANGELA LARA, *Defendant in Error.*

ERROR TO THE UNITED STATES DISTRICT COURT FOR PORTO RICO.

STATEMENT OF FACTS.

This was an action for breach of promise of marriage brought in the court below by the defendant in error by complaint filed on October 14th, 1904, wherein the plaintiff alleged that both parties were subjects of the King of Spain residing in Porto Rico; that about the first day of June, in the year 1900, in consideration of the promise of the plaintiff to marry the defendant on request, the defendant had promised to marry the plaintiff within a reasonable time; that the plaintiff, confiding in said promise, still remains single and up to the time of defendant's marriage with another was ready and willing to marry defendant: that the defendant, contrary to his said promise to plaintiff, married in the year 1904 another person to the damage of the plaintiff in the sum of $10,000. (Record, pages 1 and 2).

To this complaint the defendant demurred on two grounds: first, that the court had no jurisdiction of the action, and second, that the complaint did not state facts sufficient to constitute a cause of action under the laws of Porto Rico. (Record, page 2). This demurrer was overruled (Record, page 3), and the defendant then answered, denying the promise alleged and stating other matters of defence which need not be detailed, as they are not material to the questions raised before this court. (Record, page 3). The case was tried in regular course and on the 5th of January, 1905, a verdict was returned in favor of the plaintiff in the sum of $5,000, (Record, page 4) upon which final judgment was entered. (Record, page 5). At the conclusion of all the evidence the defendant moved that the plaintiff be non-suited, which motion was overruled, and the plaintiff moved that the jury be peremptorily instructed to find a verdict in her favor, which motion was granted. (Record, page 4).

Thereafter during the same term of the court the defendant filed two motions, one in arrest of judgment *non obstante veredicto*, (Record, page 6), both of which raise the same questions raised by the demurrer to the complaint but more specifically, especially in regard to the sufficiency of the complaint to state a cause of action, making express reference to the Section of the Civil Code of Porto Rico which defendant claimed governed the rights of the parties under the alleged contract, and expressly claiming that said Civil Code had become a Law of Congress by its adoption in the Act of April 12, 1900, which created a civil government for Porto Rico. These two motions were considered and overruled by the court, to which defendant's counsel excepted (Record, page 7) and

thereafter sued out a writ of error from this Court, and obtained the approval and certification of a Bill of Exceptions to the proceedings during the trial. (Record, pages 9-28.)

The errors assigned by plaintiff in error, defendant below, (Record, pages 8 and 9) are the following:

1. In overruling the demurrer to the complaint.
2. In overruling the objections to the admission of six certain letters offered in evidence on behalf of plaintiff.
3. In denying the motion of defendant, made at the close of all the evidence, for a peremptory instruction in his favor.
4. In instructing the jury that the testimony showed beyond a reasonable doubt the existence of a marriage contract and that the jury should confine their consideration to the subject of the amount of damage suffered by plaintiff.
5. In entering judgment in favor of plaintiff and against defendant.
6. In overruling the motion made by defendant to arrest said judgment. And
7. In overruling defen lant's motion for judgment in his favor, *non obstante veredicto.*

ARGUMENT.

The first, third, fifth, sixth and seventh assignments of error involve the two questions of the jurisdiction of the court below and the construction of the Section 44 of the Civil Code of Porto Rico, claimed to be a Federal Law by adoption, upon which the jurisdiction of this court to review the judgment of the trial court is based; hence it may be well to consider those questions

first, and all the above assignments can logically be discussed under two heads: (a) the jurisdiction, (b) the Federal question.

I

The question of jurisdiction is a doubtful one in the mind of counsel and, if of a different character, would not be urged in view of the other circumstances of the case. But as that question is one which is always open, and one which this court always considers *in limine* in cases of doubt, we briefly submit the line of thought upon which the objection was founded, by the counsel then representing the defendant in the trial court.

It may be taken for granted that no jurisdiction of a controversy between these parties, both being aliens and subjects of the same Monarchy, would exist in the Constitutional Courts of the United States existing within the States. By the Civil Government Act (of April 12, 1900) under which the trial court was created (Section 34) that court was given the combined jurisdiction of the Constitutional courts known as United States Circuit and District Courts; but by an amendment of the above Act, approved March 2, 1901, the jurisdiction of said trial court was enlarged in two respects: first, by reducing the jurisdictional amount in controversy to $1000, and second by making it "extend to and embrace controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign State or States".

It has often been contended that this language, while not entirely plain, should be construed in the light of the jurisdiction as it previously existed requiring a *diversity of citizenship*, and only extending the limits within which such diversity

might exist—thus preserving the basis of reasoning on which the Federal jurisdiction has always been recognized as resting. But however this may be, a special provision and exception seems to have been made in the case of Spanish subjects resident in Porto Rico by the Treaty of Peace of 1899 between the United States and Spain (Vol. 30, Stat. at Large, p. 1754). Article Eleven of that Treaty is as follows:

> "The Spaniards residing in the territories over which Spain by this treaty cedes or relinquishes her sovereignity shall be subject in matters civil as well as criminal to the jurisdiction of the courts of the country wherein they reside, pursuant to the ordinary laws governing the same; and they shall have the right to appear before such courts, and to pursue the same course as citizens of the country to which the courts belong."

So far as our investigation has extended, this treaty provision has never been construed by any court of high authority, but under the construction given it by the Department of Justice (Op. of Attys. Genl., Vol 23, page 93) and by the War Department (Magoon's Repts., page 475) it seems intended to give to Spaniards greater rights than enjoyed by other foreigners and, in case of being sued, a right to select the tribunal before which their rights are to be determined, a least to the extent of electing the local courts as a native citizen might do whenever he so desired. If that be the correct construction, we submit that the plaintiff in error in this case had a right to object to be judged by the trial court and to insist upon his right to be sued in the Insular courts, especially where the other party was one of his own nationality. And if the Act of Congress can be so construed as not to interfere with this treaty provision, we believe such construction will be favored.

United States vs Lee Yen Tai, 185 U S. 221.

II.

The judgment against the defendant in this case "not exceeding" five thousand dollars in amount, a writ of error would not lie from this court were not a bona fide question of jurisdiction of Federal law involved. We have discussed the question of jurisdiction above, and we also contend that all the assignments hereinbefore specifed involve the construction and application of a Federal law in so far as Section 44 of the former Civil Code of Porto Rico is concerned. This contention is based upon the provisions of Section 8 of the Civil Government Act above referred to. That section provided as follows:

> "That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this Act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended or repealed by the legislative authority hereinafter provided for Porto Rico or by Act of Congress of the United States;" etc.

It will not be contended that said Section 44 (which we shall hereafter quote) was not in force at the time of the adoption of the above Act of Congress, nor will it be contended that the same was either "altered, amended or repealed" until the adoption of a new Civil Code by the Legislative Assembly of Porto Rico in the year 1902. As the complaint in the case alleged that the contract was entered into between the parties in the year 1900, we therefore submit that the Section in question was a law by virte of its adoption by reference in the above Act of Congress of April

12, 1900, and its construction as applicable to that contract is the construction of a Federal law.

That the adoption of a law, or a system of laws, by reference has the same effect as though incorporated bodily into the Act of adoption has been repeatedly decided. To this court we need only cite two of its own decisions which have long stood unchallenged:

United States vs Simms, 1 Cranch 252
Kendall vs United States, 12 Peters 524

In the latter of these cases, at page 625, Mr. Justice Thompson used the following language:

> "It was not an uncommon course of legislation in the States at an early day to adopt, by reference, British statutes; and this has been the course of legislation by Congress in many instances where State practice and State process has been adopted. And such adoption has always been considered as referring to the law existing at the time of adoption; and no subsequent legislation has ever been supposed to affect it. And such must necessarily be the effect and operation of such adoption. No other rule would furnish any certainty as to what was the law, and would be adopting prospectively all changes that might be made in the law. And this has been the light in which this court has viewed such legislation. In the case of Cathcart vs Robinson the court, in speaking of the adoption of certain English statutes, say, by adopting them they become our own as entirely as if they had been enacted by the legislature. We are then to construe this third section of the Act of 27th of February, 1801, as if the eleventh section of the Act of 13th of February, 1801, had been incorporated at full length", etc.

Having, as we believe, proven our proposition that the Section of the old Civil Code in question is a Federal law by adoption, we now submit that the plaintiff in error was unjustly deprived of the benefit of its provisions in the case at bar. This Section (44) reads as follows: (Official Translation of War Dept., 1899)

"If the promise (of marriage) has been made in a public or private instrument by a person of age, or by a minor in the presence of the person whose consent is necessary for the celebration of the marriage, or when the banns have been published, the person who refuses to marry, without just cause, shall be obliged to indemnify the other party for the expenses which he or she may have incurred by reason of the promised marriage. An action to recover indemnity for the expenses to which the foregoing article refers may be instituted only within a year, counted from the day of the refusal to celebrate the marriage".

The question of the application of this law as a defence was raised generally by the second ground of the demurrer to the complaint (Record, page 2), and specifically by the motion to direct a verdict for defendant (page 19), the motion in arrest of judgment (page 5) and the motion for judgment for defendant *non obstante veredicto* (page 6). And if applicable, the rulings were clearly wrong, as neither in the complaint nor in the evidence was any reference made to the plaintiff having incurred any expense "by reason of the promised marriage". It is clear not only from these rulings but from the charge to the jury that the court refused absolutely to apply the provisions of this statute, as in his charge the court specifically instructs (Record, page 25) as to the elements which the jury is allowed to consider in estimating damages—and which they must have considered in arriving at such an enormous verdict.

It may be argued that the Federal question was not raised at the proper time or in a proper way, as it was too late to do so by the motions in arrest of judgment and for judgment *non obstante;* but there are two answers to this argument: first, that the question was certainly properly raised by the motion to direct a verdict at the con-

clusion of the evidence, and second, that it is sufficient if a decision by the court below upon the Federal question appears anywhere in the record.

Neilson vs Lagow, 12 How. 98
Armstrong vs Treasurer, 16 Pet. 281

It may also be contended that no Federal question was involved in the trial in the court below. But if our contention is admitted that the Section 44 of the Civil Code had become a Law of Congress by adoption, it must follow that the controversy involved the right claimed by this plaintiff in error under "a law of the United States" and "upon the determination of which the result depended," and the right was denied.

Act. of Congress of Apl. 12, 1900, Sec. 35
W. U. Tel. Co. vs Ann Arbor R. Co., 178 U. S. 239.

And it need only appear that the Federal question was distinctly raised, that it was set up in good faith, and that it was not frivolous.

Ill. Cen. R. R. Co. vs Chicago, 176 U. S. 646, 656.
Burton vs United States, 196 U. S. 283.

III

Was, then, this Section 44 of the Civil Code, above quoted, properly applicable to determine the rights of the parties under the contract set up in the complaint? If so, the court clearly erred in refusing to apply it, and erred to the manifest and vital prejudice of the plaintiff in error.

We submit that parties are supposed, in the

view of the law, to enter into contracts with a view to their rights and liabilities at the time the contract is entered into, and not what may be their rights or liabilities under the changing laws of the future; that the degree of liability is as much an integral part of the contract as the degree of right; and that when that degree of liability is fixed by law it is as much a part of the contract as when it is fixed by the parties themselves in their contract- as is usually the case—and we see no reason why this elementary rule should not be as applicable to the engagement to marry as to other contracts.

Counsel will probably argue, as was argued in the court below, that the Section in question affects only the extent of the remedy for the breach; but that seems to us a position utterly untenable and one which misapprehends the distinction between matters of right and of remedy.

It is sufficient to state the proposition that parties are conclusively presumed to know the law applicable to their contracts and, when any law affects or governs rights or obligations under such contracts, such law is read into them and made a part thereof to the same extent as if the parties had recited them therein. If that is so, let us suppose that these parties, instead of leaving the question of liability for breach to the law itself, had specifically agreed between themselves to the same effect, that is, that in case of breach of the promise on the part of either, the other should have only a claim for expenses actually incurred in preparing for the marriage. Could it then be contended that a subsequent law, which attempted to vary the agreement so expressly made and to increase or diminish the liability on either side, would merely vary the remedy and

not the substance of the contract itself? The statement of the proposition is its own answer-and the confusion of counsel for plaintiff below, in which he induced the court to follow him, very largely arose from this fact of the provision governing the extent of the obligation in case of breach being expressed by statute instead of in the contract itself.

For decisive authority on this question there is need to look no further than the decisions of this Court where the principle has been applied to varying circumstances.

The case of COGHLAN VS. SOUTH CAROLINA RAILROAD CO. was a suit to recover upon certain bonds of the defendant corporation, made payable in England, and the question was what rate of interest was to be paid after maturity, the bond itself being silent upon that subject. The court says:

> "Nevertheless, it is contended that the principal sum agreed to be paid should bear interest at the rate, seven per cent, fixed by the laws of South Carolina. The only basis for this contention is the mere fact that the bonds purport to have been made in that State. But that fact is not conclusive. All the terms of the contract must be examined, in connection with the attendant circumstances, to ascertain what law *was in the view of the parties when the contract was executed*. For, as said by Chief Justice Marshal in Wayman vs Southard, 10 Wheat. 1, it is a principle, universally recognized, that 'in every forum a contract is governed by the law with a view to which it was made'. And by Lord Mansfield in Robinson vs Bland, 2 Burr. 1077: 'The parties had a view to the law of England. The law of the place can never be the rule when the transaction is entered into with an express view to the law of another country as the rule by which it is to be governed' etc * * Referring to these and many other cases, this court, speaking by Mr. Justice Matthews, held, upon full consideration, in Pritchard vs Norton, 106 U. S. 124, that the law upon which the nature, interpretation and

validity of a contract depended, was that which the parties, either expressly or presumptively, *incorporated into it as constituting its obligation.* This doctrine was reaffirmed in Liverpool etc. Co. vs. Phoenix Ins. Co., 129 U. S. 397, where it was said that, according to the great preponderance, if not the uniform concurrence of authority, the general rule was, 'that the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view'* * * * * * What law, then, did the parties have in view *as determining the legal consequences resulting form the non-performance of the contract between them?* Presumptively, the law of England where the contract was to be entirely performed".

Coghlan vs. South Carolina R. Co.,

142 U. S. 101' 107.

The same question contained in the final paragrah above quoted, if asked in the case at bar, might be similarly answered: "Presumptively, the law of Porto Rico at the time the contract was made."

So, in a very late decision this court has reaffirmed the principle in the following language:

> "It is the same rule which obtains in the interpretation of any private contract between individuals. That, whatever may be its words, is always to be construed in the light of the statute; of the law then in force; of the circumstances and conditions of the parties."

McCullough vs Virginia, 172 U. S. 102, 112.

This court has also in several cases discussed and explained the difference between the right or obligation of a contract and remedy, which latter only can be changed by subsequent legislation Following are quotations from some of the most pertinent:

> "If the laws of the State passed afterward had done nothing more than change the remedy upon contracts

of this description, they would be liable to no Constitutional objection. For, undoubtedly, a State may regulate at pleasure the mode of proceedings in its courts in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations. It may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall like wearing apparel, not be liable to execution on judgments. * * * * * * * * Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself * * * When this contract was made, no statute had been passed by the State changing the rules of law or equity in relation to a contract of this kind. None such, at least, has been brought to the notice of the court; and it must, therefore, be governed, and the rights of the parties under it measured by the rules above stated. They were the laws of Illinois *at the time*; and therefore, *entered into the contract, and formed a part of it*, without any express stipulation to that effect in the deed. Thus, for example, there is no covenant in the instrument giving the mortgagor the right to redeem, by paying the money after the day limited in the deed, and before he was foreclosed by the decree of the court of chancery. Yet no one doubts his right or his remedy; for, by the laws of the State then in force this right and this remedy were a part of the law of the contract, without any express agreement by the parties. So, also, the rights of the mortgagee, as known to the laws, required no express stipulation to define or secure them. They were annexed to the contract at the time it was made, and formed a part of it; and any subsequent law, impairing the rights thus adquired, impairs the obligations which the contract imposed."

Bronson vs Kinzie et al, 1 How. 311, 315, 319.

"Hence it is that a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the

principles of the common law, it is not competent for the legislature to take it away. A vested right *to an existing defence* is equally protected, saving only those which are based on informalities not affecting substantial rights, which do not touch the substance of the contract, and are not based on equity and justice "

Pritchard vs Norton, 106 U. S. 124,132.

The following cases show that, where the burden or liability in case of non-performance is increased, the change is of the obligation and not of the remedy :

" Assuming, as we have a right to do, that these known and established principles of law form a part of the written conditions of the bond, it is not easy to perceive how a chancellor could interpose in the latter case, more than in the former, without disregarding the terms of the contract, and extending the liability of the surety beyond the letter and spirit of his bond."

United States vs Price, Ex'r., 9 How. 83,91.

" What the Act of 1888 does is to give a parish or municipal corporation an additional and more summary remedy for the enforcement of the obligation of any contract relating to the paving, repairing, reconstructing, or care of its streets, highways, bridges, culverts, levees, canals, ditches, or crossings. It does not enlarge the obligation assumed by the defaulting corporation, nor impose new burdens upon such corporation, but only enables the other party to the contract, the public, as represented by the parish or municipality, to compel the performance of that obligation ."

The New Orleans etc Co. vs Louisiana. 157 U. S. 219, 234.

The Act af 1888, referred to in the last quotation, was an Act of the Legislature passed after the making of the contract with the complaining Company whereby the municipalities were allowed a remedy by Mandamus to compel the Company to continue the performance of its contract, which

involved the public safety. The court held that such Act gave only an additional remedy and did not increase or vary the *obligation or liability* fixed by the contract at the time it was made; but plainly intimates that, had it done so, it would have been invalid.

In the case at bar, counsel for defendant in error claimed that the liability of plaintiff in error for breach of his alleged contract to marry was governed by the law in force at the time of the breach—and that contention was supported by the court.

That law was the general provision for damages for breach of contract contained in Section 1068 of the new Civil Code of Porto Rico, enacted by the Legislative Assembly thereof in 1902, which Section read as follows:

> "Those who in fulfilling their obligations are guilty of fraud, negligence or delay, and those who in any manner whatsoever act in contravention of the stipulations of the same, shall be subject to indemnify for the losses and damages caused thereby."

It is evident from the wording of this Section, in connection with the construction put upon it by the court as shown by that part of the charge enumerating the elements of damage which the jury should consider (Record, page 25), that the law as changed by the legislature after the making of the contract alleged in the complaint as in 1900 grievously "enlarged the obligations" of nonfulfilment and "imposed new burdens" which were not within the contemplation of the parties when the contract was made, if it in fact was made as alleged. In other words, it gave to defendant in error a larger right of recovery than she had ever anticipated, or could have anticipated at the time of entering into the contract.

We therefore insist that the various assignments of error covering the non-application of said Section 44 of the old Civil Code to the contract in controversy, the same being the Federal question involved, are well taken and should be sustained.

IV

While the right of review in this court over judgments and decrees of the District Court of the United States for Porto Rico is not governed by the provisions of the Courts of Appeals Act of 1891, but by Section 35 of the Civil Government Act relating to Porto Rico, hereinbefore cited, we believe that by analogy the same rule should prevail that, given the jurisdiction by the presence of a Federal question, the court will not confine itself to a review of that question but will re-examine the whole case upon its merits, and consider all errors properly assigned.

Holder vs Aultman 169 U. S. 88

Burton vs United States, 196 " 283

We therefore proceed to discuss briefly the other errors assigned, though firmly believing that the errors already discussed will necessitate the reversal and dismissal of the case.

V

The consideration of the second error assigned will require little discussion. It brings before the court the objection made (Record, pages 10-12 and top of 16) to the introduction in evidence before the jury on the part of plaintiff below of the six letters referred to in the assignment. A perusal of the bill of exceptions will show that these letters are all dated in the year

1894, that no other letters were produced of a date earlier than 1900, and that no evidence of any kind was produced connecting these earlier letters with the alleged promise of marriage in 1900. We therefore submit that their introduction was subject to the objection made, and that, by tending to induce the jury to believe that a long courtship had intervened, their admission in evidence was greatly prejudicial to plaintiff in error.

VI

The remaining assignment to be considered is the fourth, which covers the rulings of the judge at the trial that the existence of a contract to marry had been proven and a peremptory instruction was given to find in her favor, leaving to the jury nothing but the determination of the amount of damage (Record, pages 4,19 bottom, 20 and 21); the language of the court as stated at the top of page 20 being that such contract "had been proven beyond a reasonable doubt". Such an expression in a civil case merely shows, in the judgment of counsel, how far the trial judge had permitted his prejudices in the case to sway him.

The evidence on behalf of plaintiff below consisted of certain letters, which certainly were not very definite and contained nothing determinative of the question, and the testimony of plaintiff and members of her family, the only direct testimony of a promise being from the plaintiff and her father. The defendant positively denied that he had ever made any promise (Record, pages 10 and 18), and in addition thereto produced a letter admitted to have been written by defendant in error (Record, page 18) which tended to show that she, offended by some action of her lover, had herself broken off whatever

relations may have existed between them. Substantiating the intimations of this letter, a young man named Gaos testified (Record, page 18) that at a social dance some six or seven months previous to the time of his testimony the defendant in error had stated to him that all relations between her and Ortega had ceased. The trial took place on January 4th and 5th, 1905, and Ortega testified he had been married in Spain on October 6th, 1904, which was only three months previous to the trial —so that such statement could not have been influenced by her lover, if he was one, having been already married.

Whatever may be the comparative weight to be given to these various items of testimony, we submitt that the state of evidence was not such as to warrant the trial judge in taking the issue from the jury as to the existence of the alleged contract to marry, but the same should have been submitted for *their* determination under proper instructions. The rule which marks the dividing line between the state of evidence requiring an issue to be submitted and that allowing the judge to say that there is no competent evidence to sustain more than the one view is so well settled by the decisions of this court that citation of those decisions is unnecessary.

VII

There remain but one or two closing suggestions.

It may be argued by counsel for defendant in error that the motions in arrest of judgment and for judgment *non obstante veredicto* were not filed in time, in view of a Rule of Court limiting the time to ten days after verdict. But the application of its rules in particular cases is always

subject to discretionary action on the part of the judge presiding, and the court will observe that the wording of the order ruling upon said motions (Record, page 7) shows that they were considered upon their merits by the trial court, the language being "the said motions being now argued *and considered* by the court", whereby it clearly appears that the objections of the plaintiff's counsel to the filing thereof were also overruled.

It may also be argued that a motion for a judgment *non obstante veredicto* on behalf of a defendant is not permitted. We can see no reason for a distinction in that respect between the parties, and the right to file such motion under like circumstances is supported by the case of

Usher vs Scranton R'y. Co., 132 Fed, Rep. 405

We therefore respectfully ask that the judgment of the court below be reversed for the errors assigned, and a new trial be ordered.

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